No. 99-936

Supreme Court, U.S.
FILED
JUN 0 1 2000
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

SUSAN DUNN
171 Church Street, Suite 160
Charleston, South Carolina 29401
(803) 722-6337

DAVID RUDOVSKY
Kairys, Rudovsky, Epstein,
Messing & Rau
924 Cherry Street, Suite 500
Philadelphia, Pennsylvania 19107
(215) 925-4400

SETH KREIMER
3400 Chestnut Street
Philadelphia, Pennsylvania 19107
(215) 898-7447

PRISCILLA J. SMITH
Counsel of Record
SIMON HELLER
JULIE RIKELMAN
The Center for Reproductive
Law & Policy
120 Wall Street, 18th Floor
New York, New York 10005
(212) 514-5534

LYNN PALTROW
SUSAN FRIETSCHE
DAVID S. COHEN
Women's Law Project
125 South Ninth Street, Suite 300
Philadelphia, Pennsylvania 19107
(215) 928-9801

Counsel for Petitioners

PETITION FOR CERTIORARI FILED DECEMBER 1, 1999
CERTIORARI GRANTED FEBRUARY 28, 2000

54 pp

QUESTION PRESENTED

1. Whether the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements was properly applied to a discretionary drug testing program that targeted hospital patients and was created and implemented primarily for law enforcement purposes by police and prosecutors?

LIST OF PARTIES

The Petitioners are Crystal M. Ferguson, Theresa Joseph, Darlene M. Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and Laverne Singleton.

The Respondents are the City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker, Jr., Dr. Charles B. Hanna, Dr. Cotesworth P. Fishburne, Dr. E. Conyers O'Bryan, Melvyn Berlinsky, Patricia T. Smith, M.J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W. Peoples, and Dr. Carroll V. Bing, Jr., in their official capacities as Trustees of the Medical University of South Carolina, Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar O. Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., and Melesia Henry, R.N., personally and in their official capacities.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. Introduction 1

II. Respondents Designed and Implemented the Search Policy to Gather Evidence to Arrest the Patients. 2

III. The Search Policy Operated Within the Criminal Justice System 6

A. The Search Policy in Practice 6

B. Discretionary Decisions in Creating and Implementing the Search Policy 11

C. Lack of Search Warrants or Consent to Search 13

D. Unauthorized Disclosure of Medical Information 14

E. Grounds for Arrest 16

F. Arrests 16

IV. The Search Policy Was Not Effective in Improving Fetal Health 17

V. Procedural Background 19

SUMMARY OF ARGUMENT 19

ARGUMENT 22

I. The Searches of the Patients' Urine for Evidence of Crime Violated the Fourth Amendment 22

A. The Searches Here Do Not Fall Within the "Closely Guarded" Exceptions to the Fourth Amendment's Requirements of Warrants and Probable Cause 24

1. The Special Needs Exception Is Inapplicable Where, as Here, the Law Enforcement Purpose Is Integral to the Searches 25

2. Because Law Enforcement Played an Integral Role in the Searches at Issue Here, the Special Needs Exception Cannot Be Applied to Excuse the Lack of Warrants or Individualized Suspicion 30

3. The Special Needs Exception is Inapplicable Because the Patients' Expectation of Privacy was Undiminished 33

4. This Court's Jurisprudence Authorizing Checkpoint Seizures Is Inapplicable to the Searches Conducted in this Case 36

B. Assuming, Arguendo, That the "Special Needs" Balancing Test Does Apply Here, the Balance Weighs Against the State 40

CONCLUSION 44

TABLE OF AUTHORITIES

CASE	PAGE
Bond v. United States, 120 S. Ct. 1462 (2000)	36
Camara v. Municipal Court, 387 U.S. 523 (1967)	35
Chandler v. Miller, 520 U.S. 305 (1997)	*passim*
Chimel v. California, 395 U.S. 752 (1969)	20
Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)	28
Delaware v. Prouse, 440 U.S. 648 (1979)	39, 40
Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991)	43
Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999)	*passim*
Flippo v. West Virginia, 120 S. Ct. 7 (1999)	21, 22, 23
Griffin v. Wisconsin, 483 U.S. 868 (1987)	26, 29, 33
Johnson v. United States, 333 U.S. 10 (1948)	21
Katz v. United States, 389 U.S. 347 (1967)	21, 22
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	35
Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)	*passim*
Michigan v. Clifford, 464 U.S. 287 (1984)	24, 28, 29, 35
Mincey v. Arizona, 437 U.S. 385 (1978)	20, 21, 23, 32

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) ..... *passim*

New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... *passim*

New York v. Burger, 482 U.S. 691 (1987) ..... *passim*

O'Connor v. Ortega, 480 U.S. 709 (1987) 29, 33

Olmstead v. United States, 277 U.S. 438 (1928) 22

Pennsylvania Bd. of Parole v. Scott, 524 U.S. 357 (1998) 29

Planned Parenthood v. Casey, 505 U.S. 833 (1992) .. 36, 43

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 22

See v. City of Seattle, 387 U.S. 541 (1967) 35

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) ..... *passim*

Turner v. Dammon, 848 F.2d 440 (4th Cir. 1988) 39

Union Pacific R.R. v. Botsford, 141 U.S. 250 (1891) 42

United States v. Biswell, 406 U.S. 311 (1972) 26, 28

United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) ... 30

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 37, 40

United States v. Ortiz, 422 U.S. 891 (1975) 38, 39

United States v. United States Gypsum, 333 U.S. 364 (1948) 6

Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) .... *passim*

Whalen v. Roe, 429 U.S. 589 (1977) 35

Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 528 U.S. 1145 (1998) 42, 43

Whren v. United States, 517 U.S. 806 (1996) 27, 31

Wyoming v. Houghton, 526 U.S. 295 (1999) 36, 39

Yin v. California, 95 F.3d 864 (9th Cir. 1996) 43

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a) 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 1

S.C. Code Ann. § 1-7-310 2

S.C. Code Ann. § 1-7-320 2

S.C. Code Ann. § 20-7-510 16

S.C. Code Ann. § 44-53-370 16

S.C. Code Ann. § 44-53-440 16

U.S. Constitutional Amendment IV 1, 22

MISCELLANEOUS

Albert R. Jonsen, et al., *Clinical Ethics* (4th ed. 1998) 33, 43

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 186 F.3d 469. The opinion is set forth in the Appendix to the Petition for Certiorari (App. 3). The only written opinion of the United States District Court for the District of South Carolina is unreported and is also set forth in that Appendix (App. 36).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 13, 1999. That court also denied a petition for rehearing en banc by an 8-5 vote on September 2, 1999. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Introduction

Petitioners, nine African-American women and one white woman ("Petitioners" or "the patients"), brought this action under 42 U.S.C. § 1983 against Respondents, the City of Charleston, South Carolina, and a group of law enforcement officials and hospital trustees and personnel. Petitioners

challenged Respondents' policy of warrantless and nonconsensual drug testing for criminal investigatory purposes ("the Search Policy") of a targeted group of women who sought obstetrical care at the Medical University of South Carolina ("MUSC" or "the hospital"), the public hospital located in Charleston.[1] Members of an interagency group consisting of personnel from the City of Charleston Police Department ("the police"), the Charleston County Solicitor's Office,[2] and the hospital developed and implemented the Search Policy and applied it only at the one hospital in Charleston whose patient population was predominantly African-American. An "initial and continuing focus of the policy" was on arrest and prosecution of the targeted group. *Ferguson v. City of Charleston,* 186 F.3d 469, 484 (4th Cir. 1999) (Blake, J., dissenting). Search results were routinely used to arrest women who tested positive for cocaine, and in some cases, the threat of arrest and prosecution was used as a mechanism to coerce women into Respondents' chosen drug treatment programs.

II. Respondents Designed and Implemented the Search Policy to Gather Evidence to Arrest the Patients.

The record establishes that the Search Policy's purpose, from inception to completion, was to further the needs of South Carolina law enforcement by identifying and gathering evidence of alleged criminal activity by pregnant women. The initial communications about the Search Policy occurred after Respondent Shirley Brown, R.N. ("Nurse Brown"), a case manager in the Obstetrics Department at the hospital, learned that the Solicitor in Greenville, South Carolina was using the state child abuse statute to prosecute pregnant women for drug use during pregnancy. On the same day, Nurse Brown mentioned the report to the hospital's General

---

[1] Jurisdiction over this action was proper in the district court under 28 U.S.C. §§ 1331 and 1343(a).

[2] In South Carolina, the Solicitor is the local prosecuting attorney. *See* S.C. Code Ann. §§ 1-7-310; 1-7-320.

Counsel Joe Good. Brown Tr. 11/21/96 4:10-5:17 (JA 73-75).[3] As a result of this conversation, on August 23, 1989, Mr. Good wrote to Respondent Charles Conden, who was then the Charleston County Solicitor to inquire as follows:

> I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs. . . .
>
> Please advise us if your office is anticipating future *criminal action* and what if *anything our Medical Center needs to do to assist you in this matter.*

PX 2 (emphasis added) (App. 67).[4] On August 31, 1989, Solicitor Condon wrote to Charleston Police Chief Reuben Greenberg to ask him to consider co-chairing with Solicitor Condon a task force consisting of representatives from the police, the Solicitor's Office, and the hospital. The purpose of the task force was "to consider possible prosecution of the mothers of drug affected babies." PX 6 at 1 (App. 69).

As a result, a joint interagency task force was formed, and representatives from the Solicitor's Office, the police, and the hospital held an initial meeting in mid-September 1989. Brown Tr. 11/21/96 4:18-6:10 (JA 74-76); Condon Tr. 5:1-16 (JA 336-37); Cornely Tr. 321:25-322:8 (JA 399-400); PX 6 (App. 69-71). At the meeting, law enforcement personnel informed hospital staff that women using drugs

---

[3] Citations to witness testimony are to the witness's name, page and line number of the trial transcript, and, when applicable, to the page of the Joint Appendix ("JA") or Appendix to the Petition for Certiorari ("App.") on which the cited transcript appears.

[4] Plaintiffs' Exhibits are cited as "PX -"; Joint Exhibits as "JX -." When included in the Joint Appendix, citations also indicate the page of the Joint Appendix on which the Exhibit appears as "JA -." When included in the Appendix to the Petition for Certiorari, citations indicate the page of that Appendix on which the Exhibit appears as "App. -."

during pregnancy had violated South Carolina's criminal child abuse and neglect laws. Brown Tr. 11/21/96 5, 7:22-8:12 (JA 74-75, 77-78); Greenberg Tr. 148 (JA 540-41). Thus, as Mr. Good explained, the Policy was instituted "*[a]t the suggestion of law enforcement and the solicitor's office.*" PX 28 at 1 (emphasis added) (App. 72).

In accordance with the Search Policy's purpose of uncovering alleged criminal activity, law enforcement personnel, not hospital officials, first memorialized the Policy in a series of separate internal memoranda. These memoranda set forth the guidelines by which: women would be selected for testing; drug testing would be conducted; a formal "chain of custody" for the urine samples would be maintained; and positive drug tests would be reported to the police. *See, e.g.,* Roberts Tr. 17:11-18:15 (stating that he brought the director of the police crime lab to the hospital to discuss proper collection of urine samples) (JA 1052-53); JX 1 (10/12/89 operational guidelines written by Captain Roberts discussing when hospital personnel would notify the police) (App. 49); JX 15 (10/17/89 memo written by Solicitor listing criminal charges that could apply to women coming under the Search Policy) (App. 64); PX 14 (10/24/89 letter from Assistant Solicitor Cornely to Nurse Brown enclosing "drafts" of "our policies") (JA 1285). The October 12, 1989, operational guidelines issued by the police after consultation with the Solicitor's office refer to the positive drug tests as "probable cause" for arrest of the mother. JX 1 at 2 (App. 49); Roberts Tr. 12:17-23 (JA 1046-47).

Each aspect of the Search Policy was designed to assist law enforcement personnel in performing their duties. For instance, in order to simplify the arrest process, the hospital notified the police when a patient was ready for discharge after her delivery so that a detective could arrest her at the hospital before she had the opportunity to leave. Roberts Tr. 24:12-19 (JA 1058); Brown Tr. 11/21/96 92:18-22; PX 258 (JA 1308). At the time of arrest, hospital personnel also provided the arresting officer with the patient's address, date of birth, social security number, and aliases, if any. Brown

Tr. 11/21/96 103:19-105:15 (JA 144-46). The officer then received, according to the operational guidelines drafted by the police, a copy of the drug screen report and the discharge summary, which provided all the information necessary for arrest. JX 1 (instructing detectives to obtain copies of all medical records at time of arrest) (App. 49); Good Tr. 216:14-218:6 (JA 521-23); Waring Tr. 200:19-23 (JA 1185).

Based on these aspects of the Search Policy, at trial the district court instructed the jury:

> But what makes this case unusual and what brings it within the coverage of the Fourth Amendment is the fact that you have law enforcement and medical service people acting together.
>
> It is the fact that the so-called search, the taking of the urine sample and the testing of it for cocaine, was to be used not only for medical diagnosis, but if it was positive it was also going to be used for police and prosecutorial purposes.

Transcript of Jury Charge at 17:22-18:4 ("Jury Charge") (JA 1314). As the dissent below wrote:

> Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using crack cocaine was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use.

Ferguson, 186 F.3d at 484 (footnote omitted) (Blake, J., dissenting); *id.* ("The prosecutorial purpose of the Search Policy and the substantial involvement of law enforcement

officials from the very beginning of its implementation" were clear.).[5]

III. The Search Policy Operated Within the Criminal Justice System.

A. The Search Policy in Practice

The Policy as initially implemented and applied to four of the Petitioners required the immediate arrest of any patient when a search of her or her newborn resulted in evidence of cocaine. *See* Opposition to Petition for Certiorari at 7 n.4 ("Opp. Cert.") (conceding that from the policy's inception until early 1990 women were arrested based on a single positive drug test); Horger Tr. 28:10-14 (JA 653). Petitioners Griffin, Singleton, Knight, and Powell were all arrested at the hospital and transported to jail after they or their child had a single positive urine screen. Griffin Tr. 6:4-25, 8:1-19 (JA 546-48); Singleton Tr. 52:8-53:7, 60:1-62:5 (JA 1132-36); Knight Tr. 121-125 (JA 773-78); Powell Tr. 149-152 (JA 1011-15). As Solicitor Condon testified, these patients were treated according to the "normal criminal [] process." Condon Tr. 10:25-11:19, 78:1-15 (JA 342-43, 382-83).

The patients arrested during the Policy's initial months received no referral for drug treatment and no opportunity to obtain treatment as an "alternative" to arrest. *See* Opp. Cert. at 7 n.4; Brown Tr. 11/21/96 37:5-39:9 (JA 104-07). Even after these women were arrested, no one associated with the

---

[5]In rejecting the dissent's conclusion that the Search Policy was implemented to uncover and gather evidence of alleged criminal activity, the Fourth Circuit majority overlooked not only Respondents' voluminous testimony regarding the impetus for the Search Policy's creation, but also the overwhelming contemporaneous documentary evidence. *See Ferguson v. City of Charleston,* 186 F.3d 469, 475 n.3 (4th Cir. 1999). Respondents' post-hoc self-serving characterizations of the Search Policy's goals are simply not as reliable as contemporaneous documentary evidence. *See United States v. United States Gypsum*, 333 U.S. 364, 396 (1948) ("Where such testimony is in conflict with contemporaneous documents we can give it little weight. . . .").

Search Policy provided them with any information about drug treatment services.[6]

For instance, Petitioner Lori Griffin was searched under the Policy without her knowledge or consent in early October 1989, when she came to the hospital for prenatal care during her eighth month of pregnancy. Griffin Tr. 6, 8:1-19, 27:6-28:6 (JA 546-48, 567-68). On October 10, 1989, Nurse Brown informed Ms. Griffin that she was being released to go home; instead, police entered her hospital room, informed her that she was under arrest for distribution of cocaine to a minor, and removed her in handcuffs and shackles to a waiting police car. Griffin Tr. 8-9; 43:16-20 (JA 547-49, 581-82). Nurse Brown never presented Ms. Griffin with the option of avoiding arrest by entering a treatment program. Griffin Tr. 6:4-11, 25:5-20, 29:13-17 (JA 546, 565-66, 570). Nor had Ms. Griffin been aware that the results of her medical tests could be turned over to the police and used as the basis for her arrest. Griffin Tr. 27:9-21 (JA 567-68).

After her arrest at the hospital and until she gave birth on October 26, 1989, Ms. Griffin spent three weeks in jail in an unsanitary cell with only a metal table and cushion to serve as a bed. Griffin Tr. 12-19, 4:2-3 (JA 551-60, 544). During that time, she was transported back and forth from the hospital for further care, which she received in handcuffs and shackles. Griffin Tr. 19-22 (JA 559-63). As she stated, physicians at the hospital "would lift -- let one leg be free and the next leg they would attach to the bed." Griffin Tr. 20:15-16 (JA 560). Medical staff did not provide Ms. Griffin with substance abuse counseling or treatment during these visits, nor did they refer her to any other source of help. Griffin Tr. 22:2-13 (JA 562).

---

[6] Although Respondent Condon insisted at trial that the Search Policy was always intended to provide "amnesty," *see, e.g.*, Condon Tr. 21:18-20 (JA 355), in August 1989 he described the policy as regarding "the prosecution of the mothers." PX 6 at 1 (App. 69); *see also* Horger Tr. 28:1-3 (JA 653) (confirming that "amnesty is a term that was never used in any of the initial meetings concerning the policy").

Similarly, Respondents searched Petitioner Sandra Powell after she arrived at the hospital in labor on October 13, 1989. Powell Tr. 150:13-151:25 (JA 1013-14). The following morning, Nurse Brown informed her that her urine had tested positive for cocaine and that she would be arrested immediately for unlawful neglect of a child. Powell Tr. 151:21-25 (JA 1014); PX 281 at SOL-IC 1847. Although Ms. Powell requested assistance, stating "please, what could I do to stop this or could you help me," Nurse Brown responded simply that she would "be locked up."[7] Powell Tr. 152:1-5 (JA 1014). Ms. Powell was arrested while she was still in pain and bleeding from childbirth. Handcuffed and wearing only a hospital gown, she was transported to the city jail. Powell Tr. 152:8-17, 153:7-20, 154:2-6 (JA 1015-17); PX 281 at 01-M-12, 01-M-13.

In early 1990, Respondent Solicitor Condon altered the Policy so that women coming under its terms were threatened with arrest and prosecution if they did not enroll in a "treatment program." Condon Tr. 10:25-11:11, 12:21-13:1 (JA 342-43, 345); Brown Tr. 11/21/96 37:5-39:9 (JA 104-07). After a search revealed evidence of cocaine, Nurse Brown presented the patient with a "Solicitor's Letter," which informed her of the search results and stated: "If you fail to attend Substance Abuse and Pre-Natal Care you *will* be arrested by Charleston City Police and prosecuted by the Office of Solicitor." JX 7 (given to those patients testing positive for drugs during a prenatal visit) (emphasis in original) (JA 1265); *see also* JX 6 (substantively identical Solicitor's Letter given to women testing positive at delivery) (JA 1263). Threatening arrest in order to mandate certain behavior was a strategy the Solicitor "used routinely in the criminal justice system." Condon Tr. 14:4-7 (JA 347).

---

[7] Medical records indicate that Ms. Powell repeatedly requested help in obtaining drug treatment. *See* PX 281 at 01-M-13 (patient "re-emphasizes her desire for drug treatment"); *id.* at 01-M-32 (patient "desires to be free of addiction to cocaine" and "was accepting of information").

Both the Solicitor's Office and Nurse Brown tracked the treatment of those patients who received Solicitor's Letters, and those who failed to comply with the terms of the designated drug treatment program or again tested positive when they returned for obstetrical treatment at the hospital were immediately arrested. Brown Tr. 11/21/96 85:13-20, 11/22/96 206:15-20 (JA 134, 178); Condon Tr. 20:16-24, 97:7-17 (JA 354, 391); JX 1 (police operational guidelines stating that if "the patient has tested positive a second time for drug use . . . the subject will be taken into custody *immediately* upon her medical release") (emphasis added) (App. 49); JX 10 (JA 1269-70). Petitioners Ferguson, Pear, Joseph, Hale, and Williams were all arrested because they were unable to satisfy the terms set by the Solicitor's Office. PX 276 at CCPD 399-400 (Hale); Ferguson Tr. 187:4-189:12 (JA 462-64); PX 274 at CCPD 343-44 (Ferguson); PX 277 at CCPD 199-200 (Joseph); P. Williams Tr. 212:15-213:5, 220:14-224:4 (JA 1204-05, 1210-15); PX 283 at WIL-PD-13 (Williams); Pear Tr. 254:18-24, 256:3-257:2 (JA 956-58); PX 280 at MUSC 4666 (Pear).

For instance, after Respondents searched Petitioner Crystal Ferguson when she sought prenatal care at the hospital in the summer of 1991, she was shown the Solicitor's Letter and threatened with arrest unless she enrolled in an inpatient treatment program. Ferguson Tr. 197:3-198:10, 182:24-183:13 (JA 473-74, 457); PX 274 at SOL-IC-3530. Although Ms. Ferguson was willing to obtain treatment, she was unable to enter an inpatient program because of her child care responsibilities. Ferguson Tr. 183:22-25 (JA 458); PX 274 at 00-133. Nurse Brown reported this information to the police, who planned to arrest Ms. Ferguson on the day of her release from the hospital. Ferguson Tr. 188:3-12 (JA 463). Because Ms. Ferguson was still weak from giving birth by cesarean section, however, and her mother had died shortly after the delivery, hospital personnel agreed to permit her to return home, and the police later arranged that she would turn herself in for arrest in three weeks. Ferguson Tr. 187:4-189:12 (JA 462-64); PX 274 at

CONDN-2059. Only after she gave birth did the hospital refer Ms. Ferguson to an outpatient program; she was scheduled to begin the program on the day she turned herself in to the police. Ferguson Tr. 186:23-187:1 (JA 461).

Darlene Nicholson is the only Petitioner who avoided arrest under the Search Policy. On December 17, 1993, Nurse Brown confronted her about her cocaine use after Ms. Nicholson's urine was searched under the guise of treating her for dehydration:

> [T]hey said I was dehydrated and I needed to be hooked up to glucose. . . . [T]hey told me to drink lots of water. . . . I asked them if I was to be hooked up to the glucose machine. . . . [T]hey just told me to keep drinking water . . . and told me to use the bathroom in a cup. . . . And I asked what for and they said to see if I had enough fluid in my system so they could send me home.

Nicholson Tr. 278:8-24, 280:6-16 (JA 899-900, 902). Following this surreptitious search, Nurse Brown informed her that she could either immediately enter inpatient treatment at the hospital or face arrest. Nicholson Tr. 278:24-280:5 (JA 900-02). Although Ms. Nicholson requested that she be permitted to return home and make arrangements for her son's care before entering treatment, Nurse Brown refused and insisted that she begin treatment at the hospital immediately. Nicholson Tr. 278:24-281:1 (JA 900-02). Ms. Nicholson remained in inpatient treatment for thirty days, until her insurance expired. Nicholson Tr. 281:2-282:13 (JA 902-04). After she was released, she stopped seeking prenatal care for a period of time because of her fear of the Search Policy. Nicholson Tr. 283:6-25 (JA 905-06).

B. Discretionary Decisions in Creating and Implementing the Search Policy

Although the jurisdiction of the Solicitor and the police extended to several hospitals in the Charleston area, Respondents applied the Search Policy only at MUSC. Roberts Tr. 16:24-17:10 (JA 1051-52); Schwake Tr. 12/9/96 137:13-16, 141:1-5 (JA 1118, 1122-23); Condon Tr. 50:19-25 (JA 370-71); Durban Tr. 92:3-25 (JA 428-29); Greenberg Tr. 137:12-18, 143:13-19 (JA 538, 539).[8] Respondents also designed the Policy to focus on cocaine to the exclusion of other illegal or legal drugs that could harm the fetus. Patrick Tr. 33:21-34:6 (JA 946); Brown Tr. 11/21/96 159:8-14 (JA 153); Newman 268:2-269:17 (JA 879-81); Good Tr. 198:11-199:4; Roberts Tr. 15:22-16:7 (JA 1050-51). As hospital physicians testified, although ingestion of heroin or alcohol poses serious risks of fetal harm, the nine criteria established by the task force members for searching pregnant women were drafted specifically to uncover cocaine use. Newman Tr. 268:2-269:17 (JA 879-81); Pittard 219:21-220:14 (JA 985-86); Horger Tr. 11:16-24, 13:19-25, 16:1-12 (JA 633, 635-36, 638-39); PX 1 (JA 1282).

The nine criteria for identifying which obstetrical patients to search for cocaine allowed physicians to exercise virtually unbridled discretion because the criteria included such vague and malleable factors as pre-term labor "of no obvious cause" and "incomplete prenatal care." JX 2 at 1 (App. 53-54). For instance, despite the incomplete prenatal care category, the evidence shows that a woman described by

---

[8] The court of appeals incorrectly asserted that the Solicitor and the police had no authority to require other area hospitals to implement the Search Policy and that they tried but failed to persuade other hospitals to do so. *See Ferguson*, 186 F.3d at 480-81 & n.11. In fact, the record reveals that neither Solicitor Condon nor any member of the police department ever attempted to implement the Policy at the other hospitals in Charleston even though their jurisdiction clearly included these hospitals. Roberts Tr. 16:21-17:10 (JA 1051-52); Condon Tr. 50:19-25 (JA 370-71); Durban Tr. 72:6-11, 92:3-25 (JA 412, 428-29); Greenberg Tr. 137:12-18, 143:13-19 (JA 538, 539).

Respondent Dr. Roger Newman as having had "very limited prenatal care" was not searched. PX 19 at 2 (JA 1289).

Eventually, neonatologists were required to test infants under the Search Policy as well. Patrick Tr. 41:2-17 (JA 948). As the Medical Director of the Neonatal Intensive Care Unit testified, testing was not being done for medical reasons, but solely for purposes of the Search Policy. *Id.*; *see also* Chasnoff Tr. 15-17, 42 (discretionary criteria did not "make medical sense") (JA 284-88, 313-14). However, despite the Policy's mandate to test all infants within the criteria, hospital physicians once again exercised discretion and decided not to apply the Search Policy to newborns in the intensive care unit who came to MUSC from other area hospitals. Patrick Tr. 46:9-23, 50:22-51:2 (JA 949-50, 952-53).

Hospital personnel also exercised discretion in enforcing compliance with the Search Policy. Although the Policy officially applied throughout the hospital, the record suggests that it was enforced only at the high-risk clinic in the obstetrics/gynecology department and not in the family practice department or at other clinics within the hospital. Clair Tr. 8:3-14, 13:17-15:10 (JA 328, 331-33); Pols Tr. 321:3-331:9, 326:9-327:8 (JA 997, 1003-05); Sanders Tr. 98:15-100:4 (JA 1100-02); PX 127 (JA 1301). Additionally, Nurse Brown admitted that she called the Solicitor's office and requested another "chance" on behalf of a white patient who should have been arrested under the Policy's terms. Brown Tr. 12/10/96 81:17-82:5 (JA 265-66).

The discretion accorded the Respondents by the Search Policy resulted in a protocol that disproportionately targeted indigent, African-American women for search and then arrest. As the record demonstrates and as the court below found, the disparity between the percentage of hospital maternity patients recorded as positive for any drug who were African-American (68%) and the percentage testing positive for cocaine who were African-American (90%) was sufficient to establish a prima facie case of disparate impact discrimination. *See Ferguson*, 186 F.3d at 481; Shapiro Tr.

126:22-128:2 (App. 110-11). Ultimately, of the thirty women arrested under the Policy, twenty-nine were African-American.[9] Shapiro Tr. 187:15-17.[10]

C. Lack of Search Warrants or Consent to Search

No search warrants or court orders were obtained before women's urine was collected and searched. Jury Charge at 18:15 (JA 1315). Patients did not provide specific consent for searching their urine, nor did the hospital give any indication that its confidentiality policy, according to which "medical records and all communication pertaining to [patient] care are . . . treated as confidential," *see* PX 105 (App. 75), did not apply to these pregnant women. *See, e.g.,* Griffin Tr. 27 (JA 567-68); Powell Tr. 149 (JA 1011-12); Knight Tr. 121-22, 139 (JA 773-75, 783); Singleton Tr. 71 (JA 1145-46).

---

[9] The trial court instructed Petitioners' statistical expert to treat only 28 of the 30 women arrested as African-American for purposes of his statistical analysis because it ruled that Petitioner Joseph, who was 25 percent African-American, should be considered white. Shapiro Tr. 178:1-14, 183:14-15. However, Nurse Brown considered Ms. Joseph to be African-American. PX 277 at CCPD-199. Additionally, even the trial court itself was inconsistent in its references to Ms. Joseph's race. *See* Findings of Fact, Conclusions of Law, and Order (describing plaintiffs as "eight black women, one white woman, and one woman who is multiracial") (JA 1408).

[10] The record demonstrates that Nurse Brown, who helped establish the Search Policy and was integral to its everyday implementation, held racist views. Good Tr. 206:1-6 (JA 514); Brown Tr. 11/21/96 14-15 (JA 84-86). Nurse Brown admitted at trial that she believed that interracial relationships were "against God's way" and noted in the charts of pregnant white women if their partners were black. Brown Tr. 12/10/96 5:18-21, 64:4-66:25, 71:6-74:9 (JA 209, 250-57); M. Williams Tr. 132:7-133:1 (JA 1195-96); PX 119 (Nurse Brown notation stating that "patient live[s] with her boyfriend who is a Negro"); *see also* PX 120-123. She also raised the option of sterilization for black women testing positive for cocaine, but not for white women. M. Williams Tr. 128:9-129:5 (JA 1192-93).

As the district court correctly found, the hospital's two general consent forms were "not sufficient consent to warrant a search where the search information is furnished to law enforcement officers." Jury Charge at 21 (JA 1318-19). Even the hospital's General Counsel admitted that he was concerned that the consent forms were inadequate. Good Tr. 202:6-9 (JA 513).

All other forms related to the Search Policy were given to the woman only *after* she had already been tested for cocaine. These other forms did not seek either the patient's consent or authorization. For example, hospital staff showed the "Solicitor's Letters" to patients only after their urine was tested for drugs, i.e., after the search was conducted. *See, e.g.,* Brown Tr. 11/21/96 50:7-14 (JA 114-15); Newman Tr. 279:24-280:7 (JA 886); *see also* JX 5-7 (letters stating "[d]uring your recent examination you tested positive for drugs") (JA 1261-66). Similarly, Respondents' claim that all patients receiving prenatal care at the hospital were shown the "To Our Patients" letter, JX 10 (JA 1269-70), before they were tested for cocaine, Brown Tr. 11/22/96 199-202 (JA 171-76); Newman Tr. 243:1-7 (JA 867), is belied by the letter itself. JX 10 (stating if "we *continue* to detect evidence of drug abuse") (emphasis added) (JA 1269-70). Nursing notes for the only Petitioner whose medical record indicates that she was shown this document at all confirm this. PX 280 at BRO-WN-1415 (noting that Petitioner Pamela Pear was "given letter from the Dept. of [ob/gyn]" *after* testing positive).

D. Unauthorized Disclosure of Medical Information

Reports by hospital personnel constituted the sole means by which the Solicitor's Office and the police obtained the results of the searches of Petitioners' urine. Roberts Tr. 21:23-22:2 (JA 1055); Greenberg Tr. 132:15-16 (JA 534). Positive results for cocaine were recorded in the patient's medical chart, as well as on Rolodex cards that Nurse Brown kept in her own office. Brown Tr. 11/21/96 59:6-15 (JA

122). Nurse Brown then provided this information to law enforcement officials; Solicitor's Office employees actually had access to her office where they could review her Rolodex and other medical files. Brown Tr. 11/21/96 60:7-61:18, 109:4-13, 11/22/96 251:1-22 (JA 123-24, 147, 194-95); Good Tr. 216:19-217:5 (JA 522); JX 1 at 2 (App. 50-51).

Neither the Solicitor's Office nor the police had a search warrant, subpoena, or court order for medical information they obtained. Condon Tr. 86:8-13 (JA 388). They also lacked court authorization to receive a copy of the patient's discharge summary, containing confidential medical information such as the patient's medical history, information on sexually transmitted diseases, sterilization procedures and HIV status. Nevertheless, the hospital provided this document to the police officer who came to arrest the patient. Good Tr. 217:6-218:6 (JA 522-23).

Patients testing positive were also tracked as part of the Suspected Child Abuse and Neglect ("SCAN") meetings at which personnel from the Solicitor's Office, the police, the hospital, and the Department of Social Services discussed suspected child abuse.[11] The hospital sent confidential medical information on the patients to be discussed, such as HIV status and information on tubal ligations, to all members of the SCAN team, including personnel from the Solicitor's Office and the police. Hildebrand Tr. 126:3-20 (JA 609-10); Legare Tr. 312:1-313:18 (JA 794-97); PX 228-E; PX 178. Information on each of the patients was disclosed without their consent and without a warrant. Hildebrand Tr. 136:11-16 (JA 613); Legare Tr. 313:16-24 (JA 796-97).

The patients testified that their experience in being arrested based on searches conducted by the hospital according to the Search Policy has caused them permanently to distrust medical providers. *See, e.g.*, Griffin Tr. 10:10-12

---

[11] The SCAN meetings held at the hospital pre-dated the Search Policy and were designed to coordinate the care of all children treated at MUSC who medical staff suspected were abused or neglected. Hildebrand Tr. 124:9-125:20 (JA 607-09).

(JA 550); Singleton Tr. 73:2-13 (JA 1146-47); Ferguson Tr. 194:13-20 (JA 470). In fact, Petitioner Nicholson stated that her fear of hospitals is so pronounced that she becomes "sick to [her] stomach" when she seeks routine medical care and must request others to accompany her on her medical visits. Nicholson Tr. 298:22-299:22 (JA 912-13).

E. Grounds for Arrest

Under the Search Policy, women who tested positive for cocaine could be arrested or threatened with arrest for the crimes of possession of drugs, child neglect, or distribution of drugs to a person under eighteen, depending upon the point in pregnancy at which their cocaine use was discovered.[12] JX 2 at 11 (App. 62-63). The police had never before applied these statutes to address a pregnant woman's drug use, Roberts Tr. 13:19-25 (JA 1048), nor was any male patient ever arrested by the police and charged with drug possession based solely on a positive urine drug search. *Id.* at 50:6-13 (JA 1068). The Search Policy applied at all stages of pregnancy, both before and after fetal viability. *See, e.g.*, JX 2 at 9-12 (App. 60-63). Indeed, Petitioner Joseph was confronted by Nurse Brown and threatened under the Search Policy when she was only thirteen weeks pregnant. PX 277 at 00-255, 00-256.

F. Arrests

As Captain Roberts testified, the hospital and the police coordinated at every step of the process that led to a pregnant woman's arrest. Roberts Tr. 17:11-15 (JA 1052). Nurse Brown would call the police, file a complaint, inform them when a patient who had tested positive was about to leave the hospital, and help coordinate the woman's in-hospital arrest. Brown Tr. 11/21/96 91:3-20 (JA 141-42); Roberts Tr. 23:12-

---

[12] *See* S.C. Code Ann. § 44-53-370 (possession of cocaine misdemeanor carries a maximum sentence of two years for first offense); *id.* § 20-7-510 (criminal child neglect felony carries maximum penalty of 10 years); *id.* § 44-53-440 (distribution of drugs to persons under 18 carries maximum sentence of 20 years).

24:19 (JA 1057-58); Waring Tr. 132:3-16 (JA 1161-62). Indeed, at least one Petitioner was detained in the hospital after she was medically ready to leave in order to facilitate her arrest by the police. P. Williams Tr. 223:11-224:4 (JA 1214-15); *see also* Henry Tr. 120:10-123:18.

Women subject to arrest were, in some instances, denied the opportunity to change out of their hospital gowns or to make a phone call to family members to make arrangements for care of their children. *E.g.*, Singleton Tr. 61:11-14, 68:22-24, 69:5-8 (JA 1135-36, 1143); Powell Tr. 152:2-11; 157:4 (JA 1014-15, 1020); Knight Tr. 124:20-125:17 (JA 777-78); Griffin Tr. 11:9-12:4 (JA 551-52). Some women were arrested while still bleeding, weak and in pain from having just given birth. *E.g.*, Singleton Tr. 68:1-69:8 (JA 1142-43); Powell Tr. 153:7-20, 155:8-16 ("I pretty much couldn't move on my own") (JA 1016, 1018); Knight Tr. 125, 136:10-13 (arrested while bleeding heavily from her first vaginal childbirth and still vomiting) (JA 777-78, 782). Some women were put in handcuffs that were attached to a chain that circled their abdomens. *E.g.*, Griffin Tr. 9:12-25 (JA 549). Some were also placed in leg shackles when they were taken into custody. *E.g.*, Singleton Tr. 62:1-11 (JA 1136); Griffin Tr. 8:11-9:21 (JA 547-49); Ferguson Tr. 190:2-6 (JA 465). A blanket or sheet would be placed over the woman, and she would be wheeled out of the hospital to a waiting police car and transported to jail. *E.g.*, Singleton Tr. 62-64 (JA 1136-39); Powell Tr. 154:2-156:24 (JA 1017-19); Griffin Tr. 10 (JA 549-50); Knight Tr. 126 (JA 778-79).

IV. The Search Policy Was Not Effective in Improving Fetal Health.

The Search Policy did not reduce cocaine use, improve pregnancy outcomes, or increase the number of women successfully completing drug treatment. Indeed, if the Search Policy were responsible for a decrease in cocaine-exposed infants, one would expect to see an increase in cocaine-exposed infants after the Search Policy was

terminated, but no such increase took place. Patrick Tr. 49:22-50:21 (JA 951-52).

The Search Policy's failure to promote fetal health stemmed from its faulty design. As Dr. Ira Chasnoff, a nationally recognized expert on substance abuse and pregnancy, and Respondents' own neonatologists testified, focusing on cocaine use alone is unlikely to improve a pregnancy's outcome because of the multitude of factors contributing to a baby's health. Chasnoff Tr. 12:9-24 (JA 281-82); Horger 45:13-24 (JA 673). Moreover, numerous studies have shown that punitive programs drive women away from prenatal care and treatment programs and thus do not improve pregnancy outcomes for either mother or child.[13] Chasnoff Tr. 23:22-24:11 (JA 293); Jessup Tr. 89:11-97:2, 115:12-118:7 (JA 711-21, 722-26). In fact, because of Dr. Chasnoff's expertise, Respondents consulted him about the Search Policy's creation but then ignored his warning that such a punitive program could never improve fetal health. Chasnoff Tr. 29-31 (JA 297-301).

Indeed, the Search Policy's focus on cocaine to the exclusion of other drugs, legal or illegal, is medically senseless. As numerous witnesses for both Petitioners and Respondents testified, heroin, alcohol, and amphetamines also pose risks of harm to the fetus. Chasnoff Tr. 12-15 (JA

---

[13] Respondents suggest that the Search Policy was necessary because prior to its inception pregnant women were not attending substance abuse treatment voluntarily. *See* Opp. to Pet. for Cert. at 4. However, as Respondent Horger admitted, this belief was based solely on Nurse Brown's perceptions. Horger Tr. 18:16-19:17 (JA 641-42). In fact, prior to adopting the Search Policy, the hospital had no formal tracking system to document whether women attended substance abuse treatment and no employee in the obstetrics/gynecology department who was trained in making substance abuse referrals. Horger Tr. 20:17-21:17 (JA 644-45). Respondents' own expert testified that the information he reviewed from the hospital about women's willingness to attend treatment before implementation of the Search Policy would not be the kind reasonably relied upon by experts in his field because it included no systematic accounting of patients. Kebler Tr. 847:3-848:5 (JA 766-68).

281-85); Frank Tr. 952:12-23 (JA 486); Horger Tr. 44-47 (JA 671-75); Newman Tr. 202-203, 267-272 (JA 841-43, 878-85); Pittard Tr. 219:21-220:14 (JA 985-86). From a medical standpoint, if Respondents had wished to target the one drug that is most harmful to fetal health, they should have focused on tobacco, not cocaine. Chasnoff Tr. 13:6-19 (JA 282).

V. Procedural Background

Petitioners filed suit in 1993 for damages and injunctive relief claiming *inter alia* that urine drug tests performed pursuant to the Search Policy constituted warrantless searches in violation of the Fourth Amendment. After a six week trial, the trial court submitted Petitioners' Fourth Amendment claim to the jury which found against Petitioners. After inviting Petitioners to file a Rule 50(b) motion on the Fourth Amendment claim, the court then denied that motion. Petitioners appealed this claim, as well as three others,[14] to the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the trial court by a 2-1 vote. Petitioners' petition for rehearing *en banc* was denied by the court below by an 8-5 vote. This Court granted certiorari on February 28, 2000.

SUMMARY OF ARGUMENT

The searches at issue in this case were conducted without warrants or individualized suspicion and thus violated the Constitution unless Respondents established that Petitioners provided valid consent. But rather than examining whether the Petitioners had provided valid consent to the searches, the court below held that the warrant and probable cause requirements of the Fourth Amendment are not applicable where the government can articulate a non-law enforcement rationale for the program or policy, even where the policy implements the state's criminal law by traditional means of

---

[14] Petitioners did not seek certiorari on these three claims.

searches, arrests and prosecutions. *See Ferguson v. City of Charleston*, 186 F.3d 469, 476 (4th Cir. 1999). The "special needs" balancing test, applied by the Fourth Circuit, has never before been applied to a search primarily serving the normal needs of law enforcement and has never been applied to searches of citizens, such as the Petitioners, whose reasonable expectation of privacy is undiminished.

The court of appeals' reliance on this Court's line of cases authorizing checkpoint seizures, *see Ferguson*, 186 F.3d at 477 n.7 (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451-55 (1990)), is misplaced. The searches here -- discretionary searches of the patients' urine in the context of a supposedly confidential medical visit --bear no relationship to and were much more invasive than the brief stops for questioning and observation conducted pursuant to a nondiscretionary checkpoint program. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("There are few activities in our society more personal or private than the passing of urine.") (internal citiation omitted).

Moreover, application of the "special needs" exception to such searches is not only unprecedented, but would swallow whole the Fourth Amendment's requirements of a warrant and probable cause. Because nearly every application of the criminal law serves some other vital public health or safety purpose, "'[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation'" on the special needs exception under the Fourth Circuit's reasoning. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Chimel v. California*, 395 U.S. 752, 766 (1969)). Under such a broad interpretation of the special needs exception, Fourth Amendment protection "would approach the evaporation point." *See Chimel*, 395 U.S. at 765.

This Court has rejected numerous similar attempts to do away with the warrant requirement in the service of the

"public interest." For example, this Court held that the "vital public interest in the prompt investigation of" serious crimes, even the crime of murder, does not justify disregard of the Fourth Amendment. *Mincey*, 437 U.S. at 394 ("the seriousness of the offense under investigation" cannot justify warrantless searches); *see also Flippo v. West Virginia*, 120 S. Ct. 7, 8 (1999). Nor is disregard of the Fourth Amendment justified by the "mere fact that law enforcement may be made more efficient." *Mincey,* 437 U.S. at 393. Similarly here, the state's interest in the health of viable fetuses, even if those interests were served by this Search Policy, which they were not, *see supra* pp. 17-18, does not justify the Fourth Circuit's decision to scrap the warrant requirement in toto.

Finally, the Fourth Circuit's approach would reduce the Fourth Amendment to a balancing test, in which the extent of the invasion of privacy is weighed against the state interests served by the search. In such an equation, the rights of the individual will almost always bend to the interests of the State, leaving citizens with no assurance of privacy in their homes or persons.[15] Ironically, Fourth Amendment protections would disappear in all cases *except* where the public interest is negligible, such as, perhaps, in investigation of very minor offenses. But as Justice Brandeis noted, protections of the Fourth Amendment are the most important where the stakes are highest:

> [I]t is [] immaterial that the intrusion was in aid of law enforcement. Experience should

---

[15] As this Court has noted, the warrant requirement "provides the detached scrutiny of a neutral magistrate," ensures an "objective determination whether an intrusion is justified," and thus serves to protect citizens from arbitrary and discriminatory searches. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989); *see also Katz v. United States*, 389 U.S. 347, 358 (1967); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

> teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

ARGUMENT

I. The Searches of the Patients' Urine for Evidence of Crime Violated the Fourth Amendment.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. It is well-settled that "government ordered 'collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable,'" and thus effects a search of the person subject to the demands of the Fourth Amendment. *Chandler v. Miller,* 520 U.S. 305, 313 (1997) (quoting *Skinner,* 489 U.S. at 617). Because the urine drug screens ordered in this case are searches under the Fourth Amendment, the question is whether the searches were reasonable.

"Over and again," this Court has emphasized that a search conducted without a warrant issued upon probable cause, like the urine drug screens at issue in this case, is *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (internal quotations omitted); *see also Flippo,* 120 S. Ct. at 8; *Chandler*, 520 U.S. at 313; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

The only exception to the warrant requirement asserted by Respondents in this case was consent.[16]

Although the court below recognized the proposition that the Fourth Amendment generally requires a warrant and probable cause as prerequisites to a reasonable search in the process of law enforcement and recognized the integral involvement of law enforcement in developing and implementing the Search Policy here, *see Ferguson*, 186 F.3d at 477 n.7; *see also id.* at 484 (Blake, J., dissenting), it held that a search that was "motivated" by a desire to protect health falls outside the Fourth Amendment's protections. *See id.* at 475 n.3. Instead of examining whether the patients provided valid consent to the searches, the court of appeals held that these searches were "reasonable" under the "special needs" exception to the Fourth Amendment's requirement of warrants and probable cause.

But this Court has repeatedly refused to dispense with the warrant and probable cause requirements to uphold the constitutionality of suspicionless searches of free citizens as a part of law enforcement, even where there is a strong health or safety governmental interest. For example, this Court has held that neither the vital public interest in the prompt investigation of serious crime nor the laudable goal of increasing the efficiency of law enforcement can justify dispensing with the requirements of individualized suspicion. *Flippo,* 120 S. Ct. at 8 (rejecting "murder scene exception" to warrant requirement); *Mincey*, 437 U.S. at 393-94. Similarly, the Court has rejected application of the "special needs" exception to the warrantless search of a person's home in the aftermath of the fire, even where the search

---

[16] Although the jury found that Petitioners had consented to the searches of their urine, no fair analysis of the evidence can support such a conclusion, as this brief's recitation of the facts demonstrates. *See supra* pp. 13-14. By applying the "special needs" exception, the court of appeals avoided deciding the issue of consent entirely.

serves the important public interest of determining the cause of the fire. *Michigan v. Clifford*, 464 U.S. 287, 292 (1984).

Thus, the court of appeals' application of the "special needs" exception to searches serving normal law enforcement needs -- searches for evidence of crime -- contradicts this Court's Fourth Amendment jurisprudence and would render the Warrant Clause a "dead letter." *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 673 (1995) (O'Connor, J., dissenting).

A. The Searches Here Do Not Fall Within the "Closely Guarded" Exceptions to the Fourth Amendment's Requirements of Warrants and Probable Cause.

This Court has held that "'in certain limited circumstances,'" *Chandler*, 520 U.S. at 308 (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989)), the warrant and probable cause requirements may be disregarded and the "reasonableness" of a search or seizure may be determined using a balancing test. However, the Court has limited the cases in which such a balancing test replaces the requirements of warrants and probable cause to "closely guarded" categories. These limited exceptions include searches serving "special needs" beyond the normal need for law enforcement where the subject searched has a reduced expectation of privacy; and limited "seizures" made at highway checkpoints. *See id.* at 308, 311.[17]

The searches here fit into none of these categories and thus violate the Fourth Amendment. First, since *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), this Court has applied the "special needs" exception only to searches that have met all

---

[17] *See also Michigan v. Clifford*, 464 U.S. 287, 291-92 & 292 n.2 (1984) (administrative search of a private home to investigate the cause and origin of a fire did not fall within one of "carefully defined classes of cases" in which exceptions to the warrant requirement applied).

four factors identified by Justice Blackmun[18] and that have been conducted in situations in which there is a reduced expectation of privacy. Neither is true here. Second, the seizures at issue in the checkpoint cases are completely distinguishable from the searches of the patients' bodies at issue in this case.

1. The Special Needs Exception Is Inapplicable Where, as Here, the Law Enforcement Purpose Is Integral to the Searches.

This Court has held that "particularized exceptions to the main rule are sometimes warranted based on 'special needs, *beyond the normal need for law enforcement.*'" *Chandler*, 520 U.S. at 313 (emphasis added) (quoting *Skinner*, 489 U.S. at 619); *see also Acton*, 515 U.S. at 653; *id.* at 673 (O'Connor, J.,dissenting); *Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 619; *T.L.O.*, 469 U.S. at 356 (Brennan, J., concurring in relevant part). This Court has given some significant content to the requirement that the search program serve needs "beyond the normal need for law enforcement." Properly interpreted, "beyond the normal need for law enforcement" excludes cases in which an integral purpose of the search is arrest and prosecution; law enforcement involvement is tolerated only if it is incidental in nature and not pervasive or built into the design and implementation of the program.[19] For example, this Court has upheld as reasonable searches of public school children that led to school disciplinary action, *T.L.O.*, 469 U.S. at 343; *Acton*,

---

[18] The four factors are: 1) that the need is "special," *see Chandler v. Miller*, 520 U.S. 305, 322 (1997); 2) that the need is "beyond the normal need for law enforcement," *see, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); 3) that the warrant requirement is impracticable, *see, e.g., Skinner*, 489 U.S. at 624; and 4) that the probable cause requirement is impracticable, *see, e.g., id.* at 631.

[19] Respondents do not contend otherwise. Instead, they argue that the claimed non-law enforcement purpose here was the "primary focus" of the policy, and not a pretext. Opp. Cert. at 26-27, 21.

515 U.S. at 664-65, searches of employees for employment purposes or where the employees participate in an industry that is "regulated pervasively to ensure safety," *Skinner*, 489 U.S. at 627; *see also Von Raab,* 489 U.S. at 677, searches of probationers for supervisory purposes, *Griffin v. Wisconsin,* 483 U.S. 868, 880 (1987), and administrative inspections of businesses in "closely regulated" industries, *New York v. Burger*, 482 U.S. 691, 703-04 (1987); *United States v. Biswell*, 406 U.S. 311, 316 (1972). In such cases, the reasonableness of a search is evaluated using a balancing test rather than by determining whether a warrant based on probable cause was obtained. *See Von Raab*, 489 U.S. at 665-66; *see also Chandler*, 520 U.S. at 314 ("context-specific inquiry, examining closely the competing private and public interests advanced by the parties" appropriate in "special needs" case); *Acton*, 515 U.S. at 652-53 (reasonableness of search in special needs case "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests") (internal citations omitted).

In *Von Raab, Skinner,* and *Acton,* this Court applied the special needs exception only after noting that the searches at issue were not part of a law enforcement program and that the results of the searches could not be disclosed to law enforcement. *See Acton*, 515 U.S. at 651 ("[o]nly the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year"); *Von Raab*, 489 U.S. at 666 (applying special needs exception to program of drug testing of certain employees in sensitive positions by United States Customs Service where "test results may not be used in a criminal prosecution of the employee without the employee's consent"); *Skinner*, 489 U.S. at 621 n.5, 626 n.7 (where the respondents had claimed that the test results might be used by the police, Court noted that nothing in the record indicated that government would use test results for other than employment purposes).

Where law enforcement did become involved in searches, the "special needs" exception has only been applied where that involvement was incidental to the primary purpose of the search, and most often where law enforcement involvement occurred only after the search. The law enforcement *purpose* for the search was either non-existent or clearly secondary to the non-law enforcement purpose of the search. For example, in *T.L.O.*, where the contents of a student's purse which had been searched by a school principal because of evidence of a violation of the school's no-smoking policy were turned over to the police, this Court stressed:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.

T.L.O., 469 U.S. at 342 n.7. Similarly, in *Burger,* this Court applied the special needs balancing test to uphold an administrative inspection of a commercial property employed in a "'closely regulated' industr[y]." 482 U.S. at 700. Although this Court acknowledged that the search to enforce an administrative scheme might also uncover evidence of a crime, this Court stressed that the search was reasonable only where the administrative scheme in question was not being used as a "'pretext' to enable law enforcement authorities to gather evidence of penal law violations." *Id.* at 716 n.27.[20] In contrast here, the search by hospital personnel was indeed

---

[20] *See also Whren v. United States*, 517 U.S. 806, 811-12 (1996) ("exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes").

conducted "in conjunction with" and "at the behest of" law enforcement agencies. *Cf. T.L.O.*, 469 U.S. at 342 n.7.[21]

This Court's rulings on the legality of administrative searches with overlapping law-enforcement and non-law-enforcement purposes are instructive here as well. In those cases, even where the search is for non-law enforcement purposes, a warrant is still required, although the warrant requirements differ depending on the purpose of the search. For example, in *Clifford*, the Court evaluated a search of a home in the aftermath of a fire, distinguishing between the search to determine the cause of the fire and a second separate search to gather evidence of criminal arson. 464 U.S. at 294.[22] Noting that "the object of the search determine[d] the type of warrant required," the Court stated:

> If the *primary* object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. . . . If the *primary* object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

---

[21] *New York v. Burger* is further distinguishable from this case because of the "'unique' problem" it addressed, the "long tradition of close government supervision" of such industries, and the significantly reduced expectation of privacy that results therefrom. 482 U.S. 691, 700 (1987); *see also infra* pp. 33-36. Indeed, the doctrine allowing such searches was first articulated in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), predating the "special needs" cases.

[22] The Court held that unless a search was justified by exigent circumstances or consent even a search to determine the cause of the fire required a warrant, albeit an administrative one. *See Clifford*, 464 U.S. at 294.

Id. (emphasis added). Here, the record demonstrates that the primary object of the search was to obtain evidence of criminal activity.

In the only "special needs" case that allowed some level of law enforcement involvement, *Griffin*, this Court allowed a warrantless search by a probation officer pursuant to probation regulations allowing a search of a probationer's home for firearms. 483 U.S. at 870-71. Importantly, the search for firearms in *Griffin* served the "special need" of ensuring compliance with those regulations and not the "normal" law enforcement need of finding evidence of violation of a separate crime. Thus, as this Court noted, *Griffin*'s holding was limited to a search of a probationer pursuant to a "valid regulation" and did not address whether "*any* search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present." *Id.* at 880. In this case, by contrast, the searches were specifically formulated and implemented for the purpose of "obtaining evidence for use in criminal . . . enforcement proceedings." *See O'Connor v. Ortega*, 480 U.S. 709, 721 (1987) (plurality opinion).[23]

---

[23] Moreover, *Griffin* is also distinguished from this case because the previous finding of guilt and the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." *Griffin*, 483 U.S. at 875; *see also Pennsylvania Bd. of Parole v. Scott*, 524 U.S. 357 (1998) (exclusionary rule inapplicable in parole revocation proceedings); *Ferguson,* 186 F.3d at 486 (Blake, J., dissenting). Indeed, this Court suggested, without deciding, that the constitutional rights of probationers might be as limited as those of prisoners. *Griffin*, 483 U.S. at 874 n.2 (noting that probation regulations might be subject to the same "reasonably related to legitimate penological interests'" test as are prison regulations). Unlike probationers, the patients here had, if anything, a heightened expectation of privacy in their medical information. *See infra* pp. 33-36.

2. Because Law Enforcement Played an Integral Role in the Searches at Issue Here, the Special Needs Exception Cannot Be Applied to Excuse the Lack of Warrants or Individualized Suspicion.

In this case, a central purpose of the Search Policy was to "search for evidence qua evidence," *see United States v. Colyer*, 878 F.2d 469, 478 (D.C. Cir. 1989), in furtherance of arrests for crimes. *See supra* pp. 2-6. The searches served the normal needs of law enforcement: detection of crime and preservation of evidence to facilitate arrest and prosecution. *Id.*

The court of appeals attempted to counter the overwhelming evidence that the Search Policy served the normal needs of law enforcement by pointing to the Respondents' testimony indicating that some women were "diverted" into treatment under the Policy. *See Ferguson*, 186 F.3d at 474 n.3. Rather than serving non-law enforcement needs, diversion from prosecution into treatment programs is a normal part of the law enforcement process in South Carolina and thus actually serves law enforcement goals. As Respondent Condon testified, this "carrot and stick" approach, diverting people into treatment by threatening jail, was part of the "norms and standards of the solicitor's office" for first-time nonviolent offenders and was used for "general drug cases, simple possession cases, small property offenses." Condon Tr. 23:4-24:4 (JA 357-58).

The court below clearly struggled with its application of a balancing test to the searches here, because it recognized that law enforcement was involved from the Policy's inception. *Ferguson*, 186 F.3d at 477 n.7 ("law enforcement officers were involved in the fomulation of the policy"). In an attempt to resolve this conflict, the court first characterized the policy as "motivated by a desire to protect the health of

the children born at MUSC," as if the existence of some benevolent purpose could render irrelevant the significant law enforcement purpose. *Ferguson*, 186 F.3d at 473 n.3 (denying that the policy was "animated by a vindictive purpose to prosecute women who used cocaine during pregnancy"). Of course, just as malevolent "ulterior motives" cannot invalidate an otherwise objectively justifiable search, neither can benevolent motives justify an objectively unreasonable one. *Cf. Whren v. United States*, 517 U.S. 806, 811-13 (1996). Moreover, perhaps reflecting its discomfort with this analysis and its recognition of the lack of any similar law enforcement involvement in the other "special needs" cases, the court was forced to reach outside the special needs context and to rely on this Court's decision in *Sitz* to justify dispensing with the warrant requirement. *Ferguson*, 186 F.3d at 477 n.7 (citing *Sitz*, 496 U.S. at 451-55).[24]

Thus, the court below side-stepped the overwhelming evidence of law enforcement involvement, *see discussion supra* pp. 2-6, examining neither whether the primary object of the searches was to gather evidence of criminal activity, nor whether the drug testing scheme was a "pretext" to enable authorities to gather evidence of penal law violations. Instead, the court held blithely that "the involvement of law enforcement officers does not make a special needs analysis inappropriate." *Ferguson*, 186 F.3d at 477 n.7.

If the Fourth Circuit's reliance on the Respondents' claimed benevolent motivation as a means of avoiding the settled requirements of a warrant and individualized suspicion for law enforcement searches is upheld, the Warrant Clause would be a "dead letter." *Acton*, 515 U.S. at 673 (O'Connor, J., concurring). There is virtually no criminal law that is administered exclusively to achieve

---

[24] *Sitz* is inapplicable to this case for the reasons outlined below. *See infra* pp. 36-40.

punishment for its own sake. Drug prosecutions seek to suppress social evils, but so do laws against gambling, robbery, and embezzlement. Prosecutions for violations of income tax laws protect the public fisc, laws which punish polluters or protect wetlands guard the environment, and criminal sanctions against securities fraud guard investor confidence. Yet it cannot be the case that a motive to protect the public welfare removes the protections of the Fourth Amendment. *See Mincey*, 437 U.S. at 393. As Justice O'Connor wrote in *Acton*:

> [I]t remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime. And this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods. Nor could it be otherwise, for if being evenhanded were enough to justify evaluating a search regime under an open-ended balancing test, the Warrant Clause, which presupposes that there is *some* category of searches for which individualized suspicion is nonnegotiable, . . . would be a dead letter.

Acton, 515 U.S. at 673 (O'Connor, dissenting) (emphasis added) (internal citations omitted).

Two other factors bring this case outside the special needs exception. First, as with the drug testing program at issue in *Chandler*, the Search Policy serves a "symbolic" rather than "special" need. *See* 520 U.S. at 322; *see also Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting). The program here demonstrates "symbolic opposition to drug use," but because of its faulty design, *see supra* pp. 17-18, it "lacked a real capacity" to protect the health of fetuses or improve

pregnancy outcomes. Accordingly, Respondents were unable to establish any "real evidence of a real problem that will be solved" by the Search Policy. *Cf. Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

Second, Respondents have not shown that the "warrant and probable cause requirement [was] impracticable." *See Acton*, 515 U.S. at 653 (quoting *Griffin*, 483 U.S. at 873). The Fourth Circuit ignored this important inquiry. The reasons this Court has given for dispensing with the warrant or individualized suspicion requirements – *e.g.*, immediacy of the need in *Skinner*, 489 U.S. at 623-34, and *T.L.O.*, 469 U.S. at 340, and frustrating the routine conduct of business in *O'Connor*, 480 U.S. at 722 – are absent here, where there was ample opportunity to present evidence of probable cause to a judicial officer.

3. The Special Needs Exception Is Inapplicable Because the Patients' Expectation of Privacy Was Undiminished.

The Petitioners entered the care of the hospital as free citizens. They were assured by the hospital that their medical records would be "treated as confidential," PX 105 (hospital's patient handbook guaranteeing confidentiality) (App. 75), and were treated by physicians who by generations of practice regarded their patients' confidences as a sacred trust. *See, e.g.*, Hippocratic Oath (quoted in Albert R. Jonsen et al., *Clinical Ethics* 166 (4th ed. 1998)) ("[A]nd whatsoever I shall see or hear in the course of my profession, . . . if it be what should not be published abroad, I will never divulge, holding such things to be holy secret."). Yet the court below held that "special needs" justified testing them for evidence of cocaine use without their consent and conveying the results of those tests to law enforcement officials. This holding is entirely at odds with the "special needs" doctrine established by this Court.

Even in cases involving searches with *no* law enforcement involvement whatsoever, this Court only applies the "special needs" exception to uphold suspicionless searches when the citizens searched have a diminished expectation of privacy. As this Court wrote in *T.L.O.*:

> [e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

469 U.S. at 342 n.8 (citation omitted). Similarly, in *Skinner*, when applying the "special needs" exception, this Court emphasized that "[m]ore importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S. at 627; *see also Burger*, 482 U.S. at 700 (noting that "[a]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. . . . This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries.") (internal citation omitted). Indeed, in *Burger*, this Court noted that "[c]ertain industries have such a history of government oversight that *no* reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Id.* (emphasis added); *see also T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) ("[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally.").

Moreover, that warrants *are* required for administrative searches, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (administrative search warrant required for administrative search); *Camara v. Municipal Court,* 387 U.S. 523 (1967) (same); *See v. City of Seattle*, 387 U.S. 541 (1967) (same), shows the importance of the searched population's expectation of privacy. The only difference between those administrative search cases and non-law enforcement special needs cases is the reduced expectation of privacy of the citizens searched in the latter. As this Court noted in holding that the "special needs" exception did not apply to the administrative search of a private home to investigate a fire, "[i]f reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies. . . ." *Clifford,* 464 U.S. at 292-93.[25]

Women seeking medical care at public hospitals do not have a *reduced* expectation of privacy; instead, they have, if anything, a *heightened* expectation of privacy with respect to their medical care and records. *See Whalen v. Roe,* 429 U.S. 589, 599 (1977) (constitutional right to privacy "in avoiding disclosure of personal matters" well-established). Given this heightened expectation of privacy, dispensing with the Fourth Amendment's warrant and probable cause

---

[25] Where such a reduced expectation of privacy does exist, this Court has reasoned that "the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, . . . have lessened application . . ." *Burger,* 482 U.S. at 702; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("the warrant requirement, in particular, is unsuited to the school environment" and would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) ("[T]he warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'") (quoting *T.L.O.*, 469 U.S. at 340, 341).

requirements by expanding the "special needs" exception to cover pregnant women seeking medical care is especially pernicious. And the perniciousness of the approach of the court below is magnified because of the highly invasive nature of the searches at issue here, namely searches of the patients' urine. *See Bond v. United States*, 120 S. Ct. 1462, 1464 (2000) ("[p]hysically invasive inspection is simply more intrusive than purely visual inspection"); *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (discussing "the unique, significantly heightened protection afforded against searches of one's person"); *Skinner*, 489 U.S. at 617 ("there are few activities in our society more personal or private than the passing of urine") (citations omitted). The Fourth Circuit relegates pregnant women in their doctors' offices to a status comparable to that occupied by convicted criminals on probation, leaving them with less protection under the Fourth Amendment than motorists in their cars.[26]

4. This Court's Jurisprudence Authorizing Checkpoint Seizures Is Inapplicable to the Searches Conducted in This Case.

The court below relied on *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), to justify application of the

---

[26] The era is past in which pregnant women were regarded as peculiarly subject to the authority of the state because of their status as child-bearers. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 896-98 (1992); *id.* at 896 ("The effect of state regulation [with respect to a woman's pregnancy] on a woman's protected liberty is doubly deserving of scrutiny . . . , as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman."); *id.* at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. . . . [I]f the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.").

special needs exception to this case, pointing to the law enforcement involvement in the *Sitz* checkpoint. *See Ferguson*, 186 F.3d at 477 n.7. This Court has approved brief stops, or "seizures," for questioning or observation at fixed checkpoints, such as border patrol checkpoints, *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-50, 566-67 (1976), or sobriety checkpoints, *Sitz*, 496 U.S. at 447, 455, despite the absence of a warrant or individualized suspicion. But the court below misapplies checkpoint seizure cases to a case involving searches of persons.

First, although the Fourth Circuit referred to *Martinez-Fuerte* and its progeny as "special needs" cases, in *Sitz*, this Court carefully distinguished the two and did so specifically on the grounds that the heavy involvement of law enforcement precluded any potential finding that the program served needs "beyond the normal need" for law enforcement. In that case, this Court excused the government's failure to demonstrate a "special governmental need 'beyond the normal need' for criminal law enforcement," distinguishing between the checkpoint cases, which predated the Court's articulation of the "special needs" exception, and the special needs cases. The Court held that *Martinez-Fuerte* and the other checkpoint cases, and not *Von Raab*, "are the relevant authorities here." *Sitz*, 496 U.S. at 450. This is a further indication that the heavy involvement of law enforcement that was tolerated in the *Sitz* checkpoint should not be tolerated in a *Von Raab* special needs case, contrary to the decision of the court below. As the Solicitor General of the United States wrote recently in distinguishing between the drug testing cases and checkpoint seizure cases,

> [t]he drug testing cases involve both a search and seizure of an individual and one that implicates a uniquely personal activity. If such personal intrusions were permitted for routine crime detection, it would do much to

> undermine the general principle of the Fourth Amendment that intrusions on the person require some individualized suspicion.

Brief for United States as *Amicus Curiae* Supporting Petitioners at 21-22, *City of Indianapolis v. Edmond*, No. 99-1030 ("United States' *Edmond* Br.").

Second, this Court has stressed that the checkpoint cases involved no more than an "initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." *Sitz*, 496 U.S. at 450-51. As this Court cautioned in distinguishing between such checkpoint "seizures" in which drivers are observed by officers who stand outside the stopped car, and situations, such as those at issue here, where the personal property or body of an individual itself is searched: "[D]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard." *Id.* at 451 (citation omitted). Unlike a checkpoint "seizure," the searches here were highly particularized and discretionary and much more extensive than an "observation" – they were targeted searches of the bodily fluids of certain women at a specific hospital. Accordingly, as the Solicitor General notes:

> "[W]arrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not" . . . because of the "obviously public nature of automobile travel" . . . [and the fact that] automobiles, unlike homes or offices, are subject to a "web of pervasive regulation."

United States' *Edmond* Br. at 8-9 (internal citations omitted).

Third, at least since *United States v. Ortiz*, 422 U.S. 891 (1975), it has been clear that the limited exception to the warrant and individualized suspicion requirements that

justifies temporary seizures of motorists at properly operated checkpoints does not serve also to allow searches of one's person or even one's effects. As the Court held in *Ortiz*, at "checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." 422 U.S. at 896-97; *see also Houghton*, 526 U.S. at 303 (cases involving searches of one's person do not govern searches during automobile stops). Under the Fourth Circuit's ruling, though, the body of a pregnant woman can be searched for law enforcement purposes in the privacy of her doctor's office without consent, a warrant, or probable cause.

Finally, the Search Policy's allowance for discretion takes it completely outside the bounds of *Sitz* – and outside the bounds of the "special needs" exception. The randomness and universality of the checkpoints in *Sitz* rendered the traffic stops constitutional by preventing any abuse of discretion. Similarly, the "special needs" exception only applies to policies authorizing non-discretionary searches. *See Ferguson*, 186 F.3d at 479 ("'cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches.'") (quoting *Turner v. Dammon*, 848 F.2d 440, 446-47 (4th Cir. 1988)). As this Court noted in *Sitz*, "standardless and unconstrained discretion is the evil the Court has discerned. . . ." 496 U.S. at 454 (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)); *see also T.L.O.*, 469 U.S. at 342 n.8; *Prouse*, 440 U.S. at 654-55.

The court of appeals acknowledged this rule but erred in asserting that the Search Policy at issue here involved such neutrality. *See Ferguson*, 186 F.3d at 479. First, Respondents exercised significant discretion in choosing to enforce the Search Policy only at MUSC and only as to cocaine, even though the Solicitor's jurisdiction over child abuse and drug violations extended to other hospitals in Charleston and to other drugs. *See supra* p. 11. Second, although as the court below notes, "the urine drug screens [on pregnant women] were conducted whenever one of the

criteria for testing was met," *Ferguson*, 186 F.3d at 479, physicians exercised their discretion in determining when a patient in fact satisfied the criteria.[27] For example, Dr. Newman described a patient with "very limited pre-natal care" who was not searched under the Search Policy despite the fact that one of the criteria for testing was "inadequate prenatal care." PX 19 at 2 (JA 1289). Similarly, the hospital's physicians did not apply the criteria for testing newborns even-handedly. Instead, they chose not to enforce the Search Policy as to any newborn in their intensive care unit who came from a hospital other than MUSC. *See supra* p. 12 (Policy did not apply to "outborn babies"). The flexibility inherent in the Policy even permitted Nurse Brown to contact the Solicitor's Office and request another "chance" for a white patient who should have been arrested under its terms. Brown Tr. 12/10/96 81:17-82:5 (JA 265-66). The result of the discretion exercised by Respondents in forming and enforcing the Search Policy was a protocol that disproportionately targeted indigent, African-American women for search and then arrest. *See supra* pp. 12-13. Indeed, the Fourth Circuit held that the evidence presented by the patients at trial was sufficient to establish a prima facie case of disparate impact discrimination. *See Ferguson*, 186 F.3d at 481.

B. Assuming, *Arguendo*, That Application of the "Special Needs" Balancing Test Is Appropriate Here, the Balance Weighs Against the State.

Even in applying the balancing test the court below erred in three additional ways.[28] First, for the reasons outlined

---

[27] By contrast, a checkpoint seizure involves a seizure of every vehicle passing a given point. Even such a seizure would, however, raise significant constitutional issues if the placement of the checkpoint itself indicated an abuse of discretion. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 559-62 & n.15 (1976) (reviewing reasonableness of choice of location); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

[28] In *Acton*, 515 U.S. at 653, this Court balanced "the nature and immediacy of the governmental need at issue here, and the efficacy of

above, there was not sufficient evidence that the Search Policy was "effective." *See supra* pp. 17-18. Importantly, as applied by Respondents to five Petitioners, the Search Policy simply could not improve fetal health. Four Petitioners were arrested based on a single positive drug screen and were given no substance abuse referrals or education, *see supra* pp. 6-8 (Griffin, Singleton, Knight and Powell); , another Petitioner was searched for the first time at delivery, when the Policy could no longer affect her child's health. PX 276 at 1543-44, CCPD 399-400 (Hale, searched in December 1990 when she came to the hospital in active labor). Thus, the searches conducted on these Petitioners in particular were effective in identifying women to arrest, but not in insuring a drug-free pregnancy.[29]

In addition, the Search Policy's focus on cocaine to the exclusion of other drugs is medically senseless given the voluminous testimony at trial that other drugs are equally harmful to the fetus. *See supra* pp. 18 (heroin, amphetamines, alcohol and tobacco equally harmful). Lastly, Respondents failed to present any empirical data on the effectiveness of the targeted testing program in achieving its goal. *Cf. Sitz*, 496 U.S. at 454-55 (noting importance of the empirical data on effectiveness present in that case). Indeed, the Respondents could not even document the Search

---

this means for meeting it," *id.* at 660, "the character of the intrusion that is complained of," *id.* at 658, and "the nature of the privacy interest upon which the search here at issue intrudes," *id.* at 654.

[29] The court below contends that the urine drug screens were effective in "determin[ing] whether a woman had used cocaine during her pregnancy and thus whether her child required treatment for prenatal exposure to cocaine." *Ferguson*, 186 F.3d at 478 n.8. However, unlike in *Skinner* where the effectiveness of the drug tests was increased because employees who were tested when accidents occurred could not anticipate testing, *Chandler*, 520 U.S. at 315 (citing *Skinner*, 489 U.S. at 628), some patients who were aware of the Search Policy could avoid detection by avoiding drug use prior to a doctor's appointment. Moreover, there is no evidence that any child was given any special treatment for "prenatal exposure to cocaine."

Policy's "hit rate," the percentage of all women tested who tested positive for cocaine, because the hospital kept no records regarding the total number of women searched. McCabe Tr. 165:15-20; 177:6-17.

Second, contrary to the finding of the court below, *see Ferguson*, 186 F.3d at 479, nothing about the intrusiveness of the searches here was "minimal." The court below relies on the analysis in *Sitz* to evaluate the intrusiveness of the urine drug tests here, using the "'duration of the seizure and the intensity of the investigation'" to measure "the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained." *Id.* (quoting *Sitz*, 496 U.S. at 452). But this case does not involve such a "minimal" intrusion as does a quick glance into a car at a checkpoint on a highway. *See Sitz*, 496 U.S. at 452-53 (where signs warning of checkpoint stops allow person to avoid the stop, result is "appreciably less" "subjective intrusion" than even "roving patrols"). Rather, the patients' *bodies* were searched and confidential medical information was disclosed to law enforcement. Such a nonconsensual search of a person's body for evidence of crime is among the most intrusive searches imaginable. *See Union Pacific R.R.. v. Botsford*, 141 U.S. 250, 251 (1891); *cf. Chandler*, 520 U.S. at 313 (search relatively noninvasive where person search "control[led] further dissemination of the report").

Third, this Court has established that drug testing invades personal privacy in a fashion that brings the requirements of the Fourth Amendment to bear in full force. *See Chandler*, 520 U.S. at 313; *T.L.O.*, 469 U.S. at 337. As a result, it has approved suspicionless drug testing as "reasonable" only in a narrowly circumscribed set of circumstances. In *Skinner* and *Von Raab*, for example, the Court upheld carefully constrained programs that applied only to a limited number of government employees. By contrast, the program at issue here – if upheld – puts at risk the privacy of every pregnant woman in South Carolina. The broad holding of *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) (criminalizing

behavior by pregnant women -- whether otherwise legal or illegal -- which could potentially harm viable fetus), *cert. denied*, 528 U.S. 1145 (1998), coupled with the expansion of the special needs exception as interpreted by the court below, would authorize "special needs" searches of all pregnant women, or at least those seen smoking or drinking alcohol. In effect, it decrees that women, by becoming pregnant and seeking medical attention, place themselves in the same category as minor students in the custody of the public schools: a "custodial and tutelary" relationship "permitting a degree of supervision and control that could not be exercised over free adults." *Acton*, 515 U.S. at 655.

This result is radically at odds with the assumptions that have historically attended medical treatment of adults, in which the obligation of the medical profession is to guard the confidences of patients as a "sacred trust." Hippocratic Oath, quoted in Albert R. Jonsen, et al., *Clinical Ethics* 166 (4th ed. 1998). And it is irreconcilable with the teaching of this Court in *Planned Parenthood v. Casey*, 509 U.S. 833 (1992), that it is unconstitutional to treat pregnant women as dependents requiring the tutelage of the state. *Id.* at 895 (contrasting the "quite reasonable assumption that minors will benefit from consultation with their parents" with the constitutional impermissibility of adopting "parallel assumption about adult women").

Nor does the fact that the urine drug tests took place as part of a medical examination minimize the intrusiveness of the search.[30] The fact that the patients had no idea that their physicians were revealing what the patients believed to be

---

[30] Both cases cited by the court of appeals, *see Ferguson*, 186 F.3d at 479, involved searches for purposes of employment and not for criminal investigation. *See Yin v. California*, 95 F.3d 864, 869 (9th Cir. 1996); *Dimeo v. Griffin*, 943 F.2d 679, 682 (7th Cir. 1991) (tests for noncriminal purposes); *id.* (distinguishing person who has frequent medical exams because of illness from person who has them because of a job).

confidential information[31] to law enforcement officers rather than simply using the information for medical purposes only increases the intrusive aspect of the search, *Chandler*, 520 U.S. at 318 (relative intrusiveness of a urine drug search is dependent on whether the individual has control over the results of the search), and, indeed, has had a permanent effect on the patients' relationships with medical providers. *See, e.g.*, Griffin Tr. 10:10-12 (JA 550); Singleton Tr. 73:2-13 (JA 1146-47); Ferguson Tr. 194:13-20 (JA 470); Nicholson Tr. 298:22-299:22 (JA 912-13). The mere fact that one does not know that one is being searched for criminal purposes does not lessen the impact of the invasion. For example, a search of one's home even when one was not there would not be considered minimal, even though searching the home when the occupants are not inside would drastically minimize "fear and surprise" on the part of those searched. *Cf. Ferguson*, 186 F.3d at 479; *see also id.* at 488 (Blake, J., dissenting).

CONCLUSION

For all the foregoing reasons, and in order to insure the continued vitality of the protections of the Fourth Amendment, the judgment of the court of appeals should be reversed.

---

[31] MUSC's Patient Handbook, given to all patients, stated "medical records and all communication pertaining to your care are also treated as confidential." PX 105 (App. 75).